In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1240

JAMES DI BARTOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a jury trial in the United States District Court for the Eastern District of New York, petitioner and codefendants Fiadini and Paniccioli were found guilty of attempting to enter a federally insured bank with intent to commit larceny, in violation of 18 U.S.C. 2113(a) and 2 (5A, 207A).[1] On February 5, 1970, petitioner was sentenced for treatment and supervision under the Youth Corrections Act (3A, 214A-215A). The court of appeals affirmed without an opinion (Pet. App.).

[1] "A" refers to the Appellant's Appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court.

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The Williamsburg Savings Bank is located on the southeast corner of 86th Street and 23rd Avenue in Brooklyn, New York. On the 23rd Avenue side of the building there are three large windows set back about a foot from the building line, and in front of the windows there is an elevated concrete platform surrounded by a fence seven feet high (54A–55A; Gov. Ex. 2–B). There was testimony by a bank employee that its funds were insured by the Federal Deposit Insurance Corporation (16A–17A), and that prior to the incident hereafter related the bank was locked and secured (12A, 15A–16A).

Detective Derienzo testified that on July 13, 1968 at about 5:00 a.m. he and another detective (Lidowitz)[1] were on an investigative tour in an unmarked patrol car (48A). Daylight was just starting to break, there was no traffic, and the streets were deserted (59A, 72A, 136A). As the two detectives approached the intersection where the bank is located, Derienzo heard a crash of glass, turned to his right on 23rd Avenue, and observed three men (49A). Derienzo saw petitioner, who was standing on the sidewalk with his back to the fence, turn his head to the left toward Fiadini and Paniccioli, who were behind the fence (50A, 82A, 136A–137A). Immediately thereafter Derienzo heard a whistle and the statement: "Here comes the cops". (49A, 73A–74A, 137A). Derienzo testified that to the best of his knowledge and observation

[1] Lidowitz was not called to testify by either side. He was, however, available and this was known to defense counsel, who decided not to call him (172A–175A).

it was petitioner who whistled and made the warning statement (51A, 146A–148A), although he could not state positively that petitioner was the person who had done so (74A, 76A, 148A).

At the time of the whistle and warning Fiadini was hanging from a bank window, a 24" x 18" section of which had been broken (52A, 56A–57A, 116A). Broken glass and a concrete slab were found in the interior of the bank (18A, 57A, 60A). Under or beside Paniccioli, who was in a crouching position on the concrete platform, Derienzo found a pry bar, two crow bars, a large screwdriver, and five gloves (54A, 57A, 82A, 107A, 125A).

Immediately after Derienzo heard the whistle and the warning statement, petitioner turned and walked swiftly away toward 85th Street in the opposite direction from the police car (49A, 53A, 137A–138A). Derienzo ordered petitioner to stop, and the three codefendants were placed under arrest (53A–54A, 70A). The court charged (188A–189A):

> The mere presence of the defendant, James DiBartolo, at the scene of the crime, even though he had knowledge that a crime was being committed will not suffice to constitute aiding and abetting, unless you are convinced beyond a reasonable doubt that Mr. DiBartolo was doing something to forward the crime and with the parties present rather than a mere knowing spectator. The defendant need not personally perpetrate every act constituting the offense charged in order to become guilty.

> Now, in short, if you find that at the time the policeman came by there he was acting as lookout beyond a reasonable doubt, then he would be guilty. If he was just walking along and saw a crime being committed or saw something being done, curiously stood and watched, he would not be guilty.

Petitioner did not object (nor does he now) to this instruction as a correct statement of the law (195A).

He contends, however, that the case against him should not have been submitted to the jury since there was no substantial evidence from which it could determine beyond a reasonable doubt that he had actively assisted or participated in the crime. See *Nye & Nissen v. United States*, 336 U.S. 613, 619. The totality of the circumstances, however—the deserted street, the early hour, and petitioner's position vis-a-vis the codefendants—belies the theory that he was merely a bystander and supports the jury's conclusion that petitioner was at the scene as a lookout. This is buttressed by Derienzo's testimony that it was petitioner who had whistled and warned the others, even though this particular fact may not have been established beyond a reasonable doubt since Derienzo could not say positively that petitioner was the man. The requirement of proof beyond a reasonable doubt, however, "operates on the whole case, and not on separate bits of evidence each of which need not be so proven". *United States* v. *Valenti*, 134 F. 2d 362, 364 (C.A. 2), certiorari denied, 319 U.S. 761.

Here the entire set of circumstances warranted the inference that petitioner aided and abetted the attempted entry into the bank for purposes of larceny.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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[1] *Bailey* v. *United States*, 416 *F.* 2d 1110 (C.A.D.C.), upon which petitioner relies (Pet. 8), is distinguishable, since there the accused had walked away from his robber companion before the crime occurred, thus casting grave doubt on the theory that he had functioned as a lookout. *Id.* at 1114.

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